SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term 1965

No. 946

In the Matter of

KENNETH REYNOLDS WHEATON.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, Division Three, State of California.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion Below.

Petitioner Kenneth Reynolds Wheaton prays that a writ of certiorari issue to review a decision and order of the District Court of Appeal, Second Appellate District, Division Three, State of California in the cases of the People, Plaintiff and Respondent v. Kenneth Reynolds Wheaton, Defendant and Appellant, numbered in said District Court of Appeal, 2d Criminal No. 9915, which Decision and Order affirmed the Judgments of Conviction appealed from therein in Cases numbered 277 560 and 254 047 Superior Court, Los Angeles County, California. A copy of said Opinion and Order is attached hereto, marked Appendix, and made a part hereof.

II.

Jurisdiction.

The opinion of the District Court of Appeal, State of California, Second Appellate District, Division Three, affirming the Judgments of Conviction in Cases No. 277 560 and No. 254 047 Superior Court, Los Angeles County, California, was rendered and filed in said District Court of Appeal on July 30, 1965. Hearing in the Supreme Court of California, after judgment of the said California District Court of Appeal, was denied September 29, 1965. This petition is being filed within ninety (90) days thereafter.

The jurisdiction of the Supreme Court of the United States to review this case on petition for certiorari is invoked under 28 U.S.C.A. 1253(3).

III.

Questions for Review.

1. Since in *Griffin v. California,* 14 L. Ed. 2d 106, this Honorable Court held that the comment rule approved by California violates the Self-Incrimination Clause of the Fifth Amendment to the Constitution of the United States, which this Court made applicable to the States by the Fourteenth Amendment in *Mallory v. Hogan,* 378 U.S. 1; and that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt, can, as here, the California Court of Appeal lawfully refuse to reverse the judgments of the Superior Court by virtue of the application of the provisions of Sec. 4½ Article VI California Constitution.

2. Are the aforesaid rights under the Fifth Amendment, being those of due process, so basic that a violation of them cannot be excused under the provisions of Sec. 4½ Article VI California Constitution, but rather that they require automatic reversal *per se*.

IV.

Statement of the Case.

In the Superior Court of the State of California, County of Los Angeles, Case No. 277 560, in each of the first two counts of an amended information Defendant and Appellant therein (your petitioner herein) was accused of the crime of forgery (Calif. Penal Code Sec. 470). In each of the third and fourth counts therein he was charged with the crime of violation of Section 475 of the said Penal Code. Defendant pleaded not guilty to each charge. At the trial the jury returned a verdict of guilty with respect to each count. Defendant's motion for a new trial was denied, and as to each of the first two counts he was sentenced to the State Prison for the term prescribed by law. No sentence was pronounced as to the third and fourth counts, the trial court believing that punishment could not lawfully be separately imposed with respect to those counts (Calif. Penal Code 654).

In a prior case (Superior Court, Los Angeles County, No. 254 047) this same Defendant had been found guilty of the crime of violation of Section 10851, California Vehicle Code.

The proceedings were suspended without imposition of sentence and Defendant was placed on probation for three years. Solely because of his conviction of the charges in the instant case, Superior Court, No. 277

560, probation was revoked in the former case, No. 254 047, and he was sentenced to State Prison for the term prescribed by law. From the judgments in both cases your petitioner appealed to the California District Court of Appeal.

The District Court of Appeal thereafter affirmed all judgments; (opinion Appendix hereto). Thereafter Defendant's Petition for Hearing in the Supreme Court of California was denied, as aforesaid.

Said Defendant, your Petitioner, is now serving time in the California State Prison.

The record of relevant testimony in the Superior Court trial in case No. 277 560 was catalogued by Mr. Justice Ford in the opinion of the District Court of Appeal. (Appendix pp. 2 to 13.)

The following, certified by the Clerk of the California District Court of Appeal are filed in this Court herewith:

1. Copy of Reporter's Transcript on the trial
2. Copy of Clerk's Transcript on the Appeal to the District Court of Appeal
3. Copy of Petition for Hearing in California Supreme Court
4. Copy of Order of California Supreme Court Denying Hearing
5. Copy of Praecipe, with affidavit of service by mail on the Trial Judge, the District Attorney and the Attorney General

The State of the Evidence.

The Deputy District Attorney in her argument stated "This case is largely circumstantial. . . ." [Rep. Tr. p. 164.] Every witness who testified for the people as to the actual happenings in this case was suspect and vulnerable as to credibility on at least two points, viz.:

1. Each was either an accomplice or a good friend of the principal accomplice Henry McKay, who turned States Evidence in exchange for immunity. The witness Janet McKay was the wife of Henry McKay, the principal accomplice.

2. Each of said witnesses was, to a greater or lesser degree, obviously an escapist from responsibility and complicity in the alleged crimes, and showed no apparent concern for the Defendant.

They were all prime suspects for possessing bias, prejudice, fear, undue influence as affecting the credibility and accuracy of every one of them.

No denials were made by State's witnesses of the testimony of Ruth Kuykendall, the Defendant's grandmother, that Mrs. Janet McKay came to her home in Hemet, in June, 1963, for the day with Defendant. That she said she had been to see her husband (Henry McKay) at the jail and had said to him that she was going to get a divorce and hoped that she could marry the Defendant; and that McKay had said he would beat her up if she did, and that in July, 1963 Mrs. McKay came to Hemet with her husband, Henry McKay, and said:

> "Hank has made a deal with the cops that if they will let him out he will put the finger on some person."

Said witness also said that the person referred to was the Defendant. (Appendix, p. 12.)

Nor was there a denial of the testimony of Harold Fulkman, Defendant's cousin, that on the last Sunday in July of 1963, he heard Henry McKay say to his (Fulkman's) grandfather: "If I cannot get him here, then I will get him into Chino (a State prison) and will get him there." (Appendix, p. 12.)

Nor was there a denial of the testimony of Joseph L. Kuykendall that he had a conversation with Henry (Hank) McKay near Hemet on the last Sunday in July, 1963, wherein Mr. McKay said: "Kenny Wheaton is going to do what he is told or I will get my boys to make him 'march' ", and also McKay said: "Kenny ran with Jan while I was in jail and I will burn him." (Appendix, p. 12.)

The Defendant elected not to testify in his own behalf.

The Comment of the Prosecutor, the Nature of Which Was Condemned by This Court in Griffin v. California, 14 L. Ed. 2d 106.

Then in this atmosphere, the Prosecutor, in her opening argument to the jury made the following comment:

> "We have heard a lot of testimony from a lot of different people over the last few days and a great deal of it will depend upon your evaluation of the credibility of these witnesses.
>
> "However, the people believe there is sufficient other evidence to help support the theory of its case, of our case. First off, it is to be noted that the defendant has not taken the stand to explain or otherwise affirmatively present any evi-

dence in this case. This is certainly within his right, no person under the Federal or State Constitution may be compelled to testify, and that fact alone would certainly not be any basis for your finding him guilty. Nevertheless, it is the law, and the Court will so instruct you at the conclusion, that you may consider this along with all the other evidence in the case in evaluating it. If you feel that the state of the evidence has reached the point where the defendant could explain or it would be reasonable for him to explain, or to deny certain allegations, then you may take his failure to testify as one of those factors which you may consider in arriving at your verdict." [Rep. Tr. p. 129, line 11.]

The Instructions of the Trial Judge.

The trial Judge instructed the jury, in part, as follows:

"The corroboration of the testimony of an accomplice is sufficient, if of itself alone it tends to connect the defendant with the commission of the offense, *although it may be slight, although if standing by itself it would be entitled to but little consideration.*" [Rep. Tr. p. 120, line 19.] (Italics added.)

The Instruction of the Trial Judge, of the Nature of That Which Was Condemned in Griffin v. California (14 L. Ed. 2d 106).

The trial Judge instructed the jury, in part, by following the then California accepted instruction, in effect as follows:

That a defendant has a constitutional right not to testify; but that as to any evidence or facts against him

which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. And that, however, no such inference could be drawn as to evidence respecting which the defendant had no knowledge. That the failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt. Nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof. (Appendix, p. 17.)

The Ruling of the District Court of Appeal.

Then, the California District Court of Appeal, after conceding the error of the prosecutor and of the trial Judge, because of the ruling of this Court in *Griffin v. California*, 14 L. Ed. 2d 106, said:

> "The effect of the error must be determined in the light of Article VI, Section 4½ of the California Constitution. (*People v. Bostick*, 62 Cal. 2d 820, 62 A.C. 869, 872.)
>
> "After a review of the entire record, however, we have concluded that in the absence of the challenged instruction and the comment of the prosecutor, it is not reasonably probable that the jury would have reached a verdict more favorable to the Defendant. There has been no miscarriage of justice because of the error." (Appendix, p. 17.)

Section 4½ of Article VI California Constitution.

This Section verbatim is:

> "No judgment shall be set aside, or new trial granted in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleadings, or for any error as to any matter of procedure; unless, after an examination of the entire cause, *including the evidence,* the Court shall be of the opinion that the error complained of has resulted in a miscarriage of jusice." Amendment adopted Nov. 3, 1914. (Italics added.)

A petition for Hearing in the California Supreme Court, after judgment of said District Court of Appeal, was denied September 29, 1965.

Reasons for Granting the Writ of Certiorari.

Article VI, Section 4½ Not Applicable.

The application of Art. VI, Sec. 4½ California Constitution, as here, invades the province of the trial jury, and therefore deprives petitioner of his right to trial by jury, thus depriving him of a fair trial implicit under the due process guaranteed by the Fourteenth Amendment United States Constitution.

The Supreme Court of California recently said in *People v. Modesto* (1963), 59 Cal. 2d 722, 730:

> "Reversal is not required because of reasonable probability that in the absence of the error the jury would have reached a different verdict, ***but because the defendant has a constitutional right to have the jury determine every material issue presented by the evidence.*** Regardless of how overwhelming the

evidence of guilt may be, the denial of such a fundamental right cannot be cured by Art. VI, Section 4½, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." (Italics added.)

This court has repeatedly, held this to be a Federal Question:

Ward v. Texas, 316 U.S. 547, 550:

"When as in this case the question is properly raised as to whether a defendant has been denied the due process of law, we cannot be precluded by the verdict of the jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process."

Haynes v. Washington, 373 U.S. 503, 515:

"Our conclusion is in no way foreclosed, as the state contends, by the fact that the state trial judge, or the jury may have reached a different result on this issue.

It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of independent determination here."

(p. 518).:

"In reaching the conclusion which we do we are not unmindful of substantial independent evidence lending to demonstrate the guilt of the petitioner. As was said in Rogers vs. Richmond, 365 U.S. 534, 541:

'Indeed in many of the cases in which the command of the Due Process Clause has compelled us to reverse State convictions involving the use

> of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally inpermissible methods in their inducement.' "

Of course, we neither express nor suggest a view with regard to the ultimate guilt or innocence of the petitioner here. That is for the jury to decide on a new trial free of constitutional infirmity which the state is at liberty to order.

The true test is: Has the defendant been so prejudicial by the errors as to infect his whole trial with an absence of that fundamental fairness essential to the very concept of justice.

Escobel v. Illinois, 378 U.S. 478;
Gideon v. Wainright, 372 U.S. 335, 342.

At stake here lies the issue as to whether in the circumstances here confronting this defendant his silence was tantamount to a confessorial admission.

In *Griffin, supra,* this Court said:

> "The question remains whether, statute or not, the comment rule approved by California, violates the Fifth Amendment. We think it does. It is *in substance a rule of evidence* that allows the state the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the Court's acquiescence are *the equivalent of an offer of evidence and its acceptance.*" (Italics added.)

This being true, the defendant was deprived of his right to due process under the Constitution of the United States, to be protected against illegally obtained evidence. And as has been repeatedly held, a denial of this right compells automatic reversal *per se*.

There is no difference between a violation of such rights before trial and a violation thereof during the trial.

Conclusion.

How is it possible, under the guise of Sec. 4½, Art. VI, California Constitution, to determine what a jury would have been likely to do, given different evidence? This very provision leaves open such a wide area of speculation, as to make a defendant entitled to have his case judged solely by a jury of his peers, helpless in the clutches of this ambiguous and dangerous provision, wherein the final judgment is placed in the hands of appellate justices, who, while concededly learned and conscientious, were not at the trial, and could not possibly judge of the credibility of witnesses without observing them as they testified, and could not therefore second guess the jury.

As to the errors here conceded, we must not forget the "touchy" situation as to juries. Jurors are prone to give careful consideration to the words and attitudes of the Prosecuting Attorney, and the trial judge tells the jury they must follow his instructions.

Respectfully submitted,

BYRON J. WALTERS,
Attorney for Petitioner.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, v. Kenneth Reynolds Wheaton, Defendant and Appellant, 2d Crim. No. 9915.

Filed: July 30, 1965.

Appeals from judgments of the Superior Court of Los Angeles County. James G. Whyte, Judge. Judgments of conviction affirmed.

Weaver, Radzik, Elias & Stricklen for Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and C. Anthony Collins, Deputy Attorney General for Respondent.

In each of the first two counts of an amended information the defendant was accused of the crime of forgery. (Pen. Code § 470.) In each of the other two counts he was charged with the crime of violation of section 475 of the Penal Code.[1] The jury returned a ver-

[1]Section 475 of the Penal Code is as follows: "Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, for the payment of money or property, with the intention to pass the same, or to permit, cause or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, or any blank or unfinished check, money order, or traveler's check, made in the form or similitude of any check, money order, or traveler's check, whether the parties thereto are real or fictitious, with intention to fill up and complete such blank and unfinished note or bill, check, money order, or traveler's

dict of guilty with respect to each count. The defendant's motion for a new trial was denied and, as to the each of the first two counts, he was sentenced to be punished by imprisonment in the state prison for the term prescribed by law. No sentence was pronounced as to the third and fourth counts because the trial court believed that punishment could not be separately imposed with respect to those counts. (See Pen. Code, § 654; *People v. McFarland,* 58 Cal. 2d 748, 760-763.) The defendant has appealed from the judgment.

Portions of the record pertinent to the contentions to be considered will be noted.

David Greeley testified that in April, 1963, he was employed as a liquor clerk by Ralphs Grocery Company at 260 South La Brea Avenue in Los Angeles. On or about April 23, 1963, a writing which appeared to be a Food Giant money order bearing that date (Exhibit 1) was presented to him. In exchange for it he gave cash, cigarettes and liquor. He was "not positive" that the defendant was the man who handed the money order to him.

Robert James Zirretta testified that in April, 1963, he was employed by Ralphs Grocery Company as an assistant manager at 7257 Sunset Boulevard in Los Angeles. On or about April 23, 1963, a writing which appeared to be a Food Giant money order bearing that date and which was in the amount of $102.50 (Exhibit 2) was presented to him. He approved it and directed the man presenting it to take it to Bessie Carraro at

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check, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same; or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison for not less than one year or more than 14 years."

a check stand for the purpose of receiving cash for it. He could not "positively say yes or no" that it was the defendant who sought to have the money order approved.

Bessie Carraro testified that in exchange for the money order she gave cash to a man, but she could not remember whether that person was the defendant.

Donald H. Gasink testified that he was the chief special agent for the Bank of Pico Rivera. He related the procedure used by his bank in placing orders with the Burroughs Corporation, Todd Division, for the printing of money orders in the form of those involved in this case. He also testified as to the deficiencies appearing on the face of the two money orders which showed that they were not genuine. They had not been received by the bank from the printing company for distribution. When the two money orders came to his attention, he directed that each be returned to the bank from which it had been received by the Bank of Pico Rivera.

Louis Paul Matter testified that he was the quality control manager at the Burroughs Corporation printing plant in the City of Industry. After looking at the two money orders, he testified as follows: "They are money orders from a specific group of money orders that we produce for the Bank of Pico Rivera." But, he further said, they had not gone through the complete process of preparation at the Burrough Company's plant. Part of his testimony was: "Q. Do you know of your own knowledge what happened to the particular run of money orders for the Food Giant market of which People's 1 and 2 were a part? . . . [A.] There were a total of 15 rolls of paper which were taken from the back end of the press and put into tubes to be taken away and de-

stroyed because the magnetic and coding on them would not have been up to specifications, and to collate the forms would have been a useless operation." The waste material from the run of which Exhibits 1 and 2 were a part was packed up by Western Paper Mills Supplies, Inc., on April 16, 1963. With respect to the condition of the particular material so taken from the Burroughs Corporation on that date, the witness testified: "This is the first instance where we have had to take entire rolls from the press and destroy them. And prior to and during the time this order was processed we did not have the procedure of running rolls of paper through the band saw, so at this time when these were processed these could have been taken back and merely dumped in the baler instead of run through a saw, and our shredder would not shred these large rolls of paper."[2]

Ellsworth M. Hazzard testified that he was the personnel superintendent for the U. S. Gypsum Company in South Gate. The defendant Wheaton was employed by that company, the last period of employment being from September 27, 1962, to January 30, 1963. He was then a hydrapulper supplyman. His duties included the cutting of the wire around baled paper and the placing of the materials on a large conveyor by hand. The bales were stored on an unenclosed dock. There was no door between the dock and the room where the conveyor was located. The plant was enclosed by a steel fence approximately six feet high, with barbed wire extending about a foot above that. Mr. Hazzard testified that after approximately 4:30 p.m. ordinarily no one was present at

[2]Thereafter the court instructed the jury "to disregard any testimony about a course of practice involving either the cutting of the material by either a band saw or a shredding process."

the dock. The employees started work there in the morning at "7 or 8 o'clock, five days a week."

Henry McKay was called as a witness for the People. He was in custody, having pleaded guilty to a charge in another case. Before that, for approximately two years he lived with his wife, Janet McKay, at 143 East El Segundo in Los Angeles until about May 27, 1963. He had known the defendant since approximately January of 1963 as "a combination of casual acquaintance, friend and business associate." With reference to the money ordes (Exhibits 1 and 2), the witness testified in part as follows: "I obtained the checks approximately 10 days prior to my arrest for the crime that was involved here, and the date is rather fuzzy to me . . .— I believe it was some time in May.[3] I mean this I can't exactly state for sure. I can just remember the incident. . . . I was out riding around with a couple other men and I came home and the defendant and another man and my wife—. . . . The defendant and my wife an a friend of mine, Virgil Copeland, Renee Cook, my

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[3]On cross-examination the witness testified in part as follows: "Q. What was the date that Kenny Wheaton allegedly brought these money orders and checks over to your house? A. It was approximately 10 days prior to my arrest. I remember that because I was arrested on a Saturday and he brought them over on a Wednesday or a Tuesday—Wednesday morning, early Wednesday morning I believe it was. Q. And you were arrested approximately May the 27th? A. May the 27th, April the 27th I don't know. One of those days. I was arrested several times last year. Q. Was it your testimony on direct that you were arrested on May the 27th? A. I was arrested—I was arrested twice on this. Q. Was it your testimony that— A. I mean yes, it was in my testimony but like I said, I have quite a bit of trouble with dates and things like that. Q. Did I understand you to say that it was about mid-May when Kenny allegedly brought those to your house? A. That's what I said, but in looking at this, it was in mid-April. I mean, that's about as close as I can come to it."

children, were present at the house when I came home, and I was talking some business with these men that I was with, and as the business was terminating I was walking out of the house when Mr. Wheaton, the defendant, called me back into the house to show me something. . . . I followed him back into the house. I followed him into the kitchen and he produced the money orders. . . . I saw him go to the closet, he had his back towards me and took the money orders from the closet and put them on the table. . . . There was quite a few of them. I imagine I gathered up quite a bunch of them in my hand, see what they were, and I looked at them, made some comments on them."

The witness McKay further testified: "I mentioned that I would sell them for $10 apiece and that I would give him $3 apiece for them. . . . [H]e just told me that just go ahead and do it any way I wanted to, and he knew I'd take care of him on it." The witness said that part of the discussion took place in the bedroom where they went for privacy. His wife also went into the bedroom after he and the defendant had entered that room; then she "went back out."

As to the appearance of the paper which he saw on the kitchen table, the witness stated: "Well, there wasn't any individual money orders at that time, it was in groups. . . . Well, there was approximately 20 sheets with 12 useable money orders on them. There was approximately 35 or 40 sheets with six useable money orders on them, and then there was quite a bit of loose rough-cut sheets that had oh, maybe three or four money orders on them." When the witness went into the bedroom for the further discussion, he took the money orders with him.

Another portion of the witness McKay's testimony was: "A. Oh yes, we agreed not to have anybody in immediate contact with the paper to pass them, like myself, himself, my wife, Renee Cook, Virgil Copeland. Q. And whose idea was it to specifically exclude those people from passing them, any of this paper? A. It was mine. Q. And what did the defendant say, if anything, to that? A. He agreed."

The witness McKay also testified that the defendant told him where he got the paper; he said that he went over the fence and "went scrounging through there" to see what he could find, but he did not mention the name of the company. About a month prior to that time, the witness saw the defendant go over the fence at the premises of the U. S. Gypsum Company when they went there for the purpose of getting some payroll checks, but on that occasion no paper of the "right type" was found. His first discussion with the defendant about obtaining paper from the U. S. Gypsum Company "was back in February."

The witness McKay further testified that he placed the amount on each of the two money orders (Exhibits 1 and 2) with a check protector which he identified as being one shown him in court (Exhibit 6). He had directed the officers to the place where the check protector was found. Along with the money order marked Exhibit 1, he sold cards for identification. The purchaser was Walter Kelly and the sale occurred two or three days after the witness obtained "the paper." The other money order (Exhibit 2) "went at the same time." He sold approximately 25 money orders to Kelly.

Henry McKay testified that he would not allow his wife to participate in any way with respect to the matter of the money orders.

Fountain Virgil Copeland, a witness on behalf of the People, testified that he knew Mr. and Mrs. Henry McKay and remembered a visit to their home about April 23, 1963. The defendant came there about 2 a.m. and Mr. McKay came home approximately one and half or two hours later. When the defendant arrived he took a roll of paper from underneath his shirt and placed it on the kitchen table. The witness Copeland further testified: "And I looked at it and I seen it was some kind of checks or something. I was scared, I threw it in the closet. . . . All I could tell was that they were some kind of money orders." And to the conversation in the kitchen after Henry McKay came home, the witness said: "Well, there was conversation going on but I didn't want nothing to do with it and I didn't pay much attention to it." He went into the living room. On cross-examination he testified that he did not participate in the discussion as to the way to distribute the money orders, but he was in the room. He was "not positive" that the money orders which were in the courtroom were among those that he saw at the McKay home.

Mr. Copeland also testified that the check protector and the money orders contained in a suitcase were picked up by the police at a motel where he and Henry McKay were registered, but he had not known that those items were there.

Janet McKay, called as a witness on behalf of the People, testified that she was the wife of Henry McKay. About the middle of April, 1963, she saw the defendant at her home when she returned shortly after midnight. Several hours later she saw a "series of checks." Part of her testimony was: ". ... I was in the kitchen cooking and everybody else was kind of gathered

around, you know, in the kitchen, and all of a sudden the checks appeared." The defendant removed them from the broom closet in the kitchen and said, "Hey, Hank, look what I got for you." She further testified that she "got a little upset about it at the time" because she did not want anything at her house that was stolen. She asked the defendant why he brought "them" there. She described the papers as follows: "They were in long strips and folded over double. Perhaps they were maybe four, four feet long. Could be that long, folded over double." The papers were taken into the bedroom and she was in and out of there; her husband told her to get out. The next day he saw the check protector in the kitchen. Several days later her husband called her and told her to put the papers in a suitcase and he would pick them up. She did so, and that was the last time she saw them "until recently."

Mrs. McKay further testified that she saw a check protector which her husband had in the kitchen. She never saw him use it, "[n]ot on these checks anyway." The check protector marked as Exhibit 6 appeared to her to be the one that she saw on the kitchen table the next day after she first observed the checks or money orders. When she put them in the suit case they had been cut. She testified in part as follows: "Q. Were you instructed to dispose of them yourself, or do anything with them? A. No. The scraps I was, but that's all." She heard discussion between her husband and the defendant about the money orders on the first night, a portion of her testimony being as follows: "Well, Hank was real excited about them. In fact, everybody was. . . . And he said that, well, Kenny said that he'd try to get him more, that these weren't very good. And Hank said

they were just fine, you know, he could do just fine with them and then as he was leaving Hank called wait a minute and said that if they'd figure out financial arrangements later, and Kenny said okay, he wasn't worried about that right then." She further testified that "they was always talking about them when they were together when I was around for the next few days." Approximately a week later she saw her husband give the defendant money; her husband told the defendant that when more money came in from the money orders the defendant would get "his."

On cross-examination Mrs. McKay said that her husband cut the money orders by himself, using a paper cutter, but a man named Kelly was there. She disposed of the scraps of paper by throwing them in the trash"; she did not burn them.

Albert Chavez was called as a witness by the People. He was receiving supervisor for the U. S. Gypsum Company. He testified as to the receipt of a bale of paper from the Burroughs Company on April 17, 1963.

Renee Cook testified that she lived at the McKay home from approximately Thanksgiving day of 1962 to about the end of April of 1963. She took care of the McKay children. About April 23, 1963, the defendant came to the house about 2:30 or 3:00 a.m. Later Mr. McKay returned home. She saw nothing unusual on the kitchen table and heard no discussion between the defendant and Mr. McKay about any checks or money orders. She also testified that she did see the two money orders on the kitchen table (Exhibits 1 and 2), along with others which were "scattered on the table." She further testified: "They were in a strip and then they had cut them up cutting them up. . . . The following

day that they cut them up." She did not recall what man had taken them out of the closet in the kitchen. She also testified as follows: "And then they were making the amount of moneys on the checks and then they got rid of all. They put it all in suitcase and then they just took off. . . . Danny and it was Virgil and Hank took them away from the house."

William L. Bowman testified that he was an examiner of questioned documents for the Los Angeles County Sheriff's Department. He expressed the opinion that the check protector in evidence (Exhibit 6) had been used to make the impressions on the two money orders (Exhibits 1 and 2).

Thereafter the defendant offered witnesses who mainly testified as to impeaching statements or conduct, the making or occurrence of which had been denied by witnesses for the prosecution in the course of cross-examination.

The first witness called on behalf of the defendant was Dean Tulley. He testified that in the latter part of June and the first part of July of 1963, the defendant was residing at Janet McKay's house. On one occasion at about 3 o'clock in the afternoon the defendant and Mrs. McKay were in bed together in the bedroom. He believed that he heard that Mr. McKay was in jail.

Mary Jane Wood was called as a witness on behalf of the defendant. Mrs. McKay phoned her in the latter part of June or early in July of 1963 and said that she was in love with the defendan tand was going to tell her husband that she wanted a divorce. In June the defendant gave Mrs. McKay's phone number to the witness as the phone number by which he could be reached.

Ruth Kykendall, the defendant's grandmother, testified on his behalf. In the first part of June, 1963, the defendant and Janet McKay came to her home in Hemet for the day. Mrs. McKay said that she had been to see her husband at the jail and had said to him that she was going to get a divorce and hoped that she could marry the defendant. She further said that Mr. McKay told her that he would beat her up if she did. In the latter part of July Mrs. McKay came to Hemet with her husband. Mrs. McKay said, "Hank has made a deal with the cops that if they will let him out he will put the finger on some person." She also said that that person was the defendant.

Harold Fulkman, who was 16 years old, testified that he was the defendant's cousin. On the last Sunday in July of 1963, they went hunting in the vicinity of Hemet. Mr. McKay came to the house of the witness' grandfather. He heard Mr. McKay say to his grandfather, "If I can not get him here, then I will get him into Chino and will get him there."

Joseph L. Kykendall testified on behalf of the defendant. On the last Sunday in July of 1963, he had a conversation with Hank McKay near Hemet. Mr. McKay said, "Kenny Wheaton is going to do what he is told or I will get my boys to make him march." He also said, "Kenny ran with Jan while I was in jail and I will burn him."

In rebuttal the prosecution recalled Janet McKay as a witness. In substance she denied that there had ever been any occasion upon which she was in bed when Dean Tulley came to her house at approximately 3 o'clock in the afternoon. She denied that she told Mary Jane Wood that she was going to leave her husband and

marry the defendant. Her husband was in jail in the latter part of June and the early part of July. At that time she was receiving state aid.

John E. Evans, Jr., a deputy sheriff for the County of Los Angeles, was called as a witness in rebuttal. He made no promises of any kind to Henry McKay. Mr. McKay, when asked, freely and voluntarily revealed the source of his supply of money orders.

The defendant did not testify as a witness in his own behalf.

"The crime of forgery consists either in the false-making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud (Sec. 470, Pen. Code.)" (*People v. McKenna,* 11 Cal. 2d 327, 332.) In each of the last two counts of the information, the alleged violation of section 475 of the Penal Code was that the defendant "did willfully, unlawfully, feloniously and knowingly have in his possession a blank and unfinished money order made in the form and similitude of a money order with the intent to fill up and complete such blank and unfinished money order and to utter and pass the same, and to permit, cause, and procure the same to be uttered and passed, with intent to defraud" named persons.

The first contention made by the defendant is that the evidence was insufficient to sustain the conviction in that there was no evidence to corroborate the "accomplice testimony" which "connected appellant to the offense charged." After having given the instructor set forth in the footnote,[4] the trial court instructed the

[4]"A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

jury as follows: "If any crime, the commission of which is alleged in the information, was committed by anyone, then, under the evidence in this case and as a matter of law, the witness Hank McKay was an accomplice. Whether any other person was or other persons were accomplices is for you to determine from the evidence introduced."

The question thus presented is whether the jury could properly find that the witnesses Janet McKay and Virgil Copeland, or either of them, did not fall into the category of an accomplice and, if so, whether their testimony, or that of either of them found not to be an accomplice, was sufficient to constitute the requisite corroboration of the testimony of the witness Henry McKay.

As succinctly stated in *People v. Franklin,* 194 Cal. App. 2d 33, at page 31: "The key to the role of an accomplice in participation in a crime lies in his volitional common intent to unite with the principal offender in its perpetration. The cases have defined an accomplice as one who 'must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime.' [Citations.]" The jury was warranted in finding that neither Mrs. McKay nor Virgil Copeland with common intent united with the de-

"An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the testimony and the circumstances as shown by the evidence. There is an exception to this which will be covered by a later instruction.

"To render a person an accomplice, he or she must in some manner knowingly and with criminal intent aid and abet or assist or participate in the criminal act. If you should find that any witness in this case so conducted himself in respect to any crime charged, you must find that he was an accomplice as to that crime."

fendant in the commission of a crime within the meaning of the quoted definition. It is true that Mrs. McKay disposed of the scraps of paper resulting from her husband's labor in preparing the money order forms for fraudulent use and that she carried out his directions in putting the prepared forms in a suitcase to be taken from her home, but such conduct did not compel the inference that she, with the requisite intent, was acting in concert with her husband and the defendant in furtherance of their criminal purpose. (See *People v. McCleary,* 205 Cal. App. 2d 432, 435-436.)

With respect to the subject of what constitutes the requisite corroboration, the Supreme Court stated in *People v. Lyons,* 50 Cal. 2d 245, at page 257: "The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." In *People v. Wade,* 53 Cal. 2d 322, the court said at page 329: "The corroborative evidence may be slight and entitled to little consideration when standing alone."

The accomplice Henry McKay testified that he and the defendant agreed that the money orders would not be passed by anyone closely connected with them but that they would be sold. The only purpose of such a sale would be, of course, to enable the purchaser to pass

the forged money orders as genuine. McKay further testified to his completion of the money order forms so that they could be so used and as to the sale thereof to Kelly. The testimony of Virgil Copeland corroborated that of McKay as to the presence of the uncompleted forms in the possession of the defendant at the McKay home. The testimony of Mrs. McKay, however, was of more significance. She testified that she observed the uncompleted forms in her home, as well as the presence of a check protector. She heard her husband and McKay discuss the money orders and the financial arrangements with respect to them. She testified that her husband cut the paper into individual forms and that the money orders were in that condition when they were removed from the house. Her testimony clearly supported the testimony of her husband to the effect that he and the defendant had in their possession unfinished money orders for the purpose of completing them so that they could be uttered or passed as genuine. Her testimony also lent substantial support to that of her husband as to the completion of the forged forms for such use.

If Mrs. McKay was not an accomplice, her testimony satisfied the test stated in *People v. Lyons, supra,* 50 Cal. 2d 245, 257, as to the sufficiency of corroborative evidence. Since the evidence was sufficient to sustain a finding that she was not an accomplice, and since the question of whether she occupied that position was left to the jury under proper instructions, it must be presumed in support of the judgment that the jury found that she was not an accomplice. (*People v. Rosoto,* 58 Cal. 2d 304, 329.)

The second contention of the defendant relates to the giving of an instruction on the subject of the failure of

the defendant to take the witness stand of the nature of that which was condemned in *Griffin v. California,* .... U.S. ....,* and to the comment of the prosecutor as to such failure in the course of his opening argument to the jury. The statement of the prosecution was: "However, the People believe there is sufficient other evidence to help support the theory of its case, of our case. First off, it is to be noted that the defendant has not taken the stand to explain or otherwise affirmatively present any evidence in this case. This is certainly within his right, no person under the Federal or State Constitution may be compelled to testify, and that fact alone would certainly not be any basis for your finding him guilty. Nevertheless, it is the law, and the court will so instruct you at the conclusion, that you may consider this along with all the other evidence in the case in evaluating it. If you feel that the state of the evidence has reached the point where the defendant could explain or it would be reasonable for him to explain, or to deny certain allegations, then you may take his failure to testify as one of those factors which you may consider in arriving at your verdict."

The effect of the error must be determined in the light of article VI, section 4½, of the California Constitution. (*People v. Bostick,* 62 Cal. 2d ...., ...** After a review of the entire record, however, we have concluded that in the absence of the challenged instruction and the comment of the prosecutor it is not reasonably probable that the jury would have reached a verdict more favorable to the defendant. There has been no miscarriage of justice because of the error.

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*Filed April 28, 1965.

**Advance Report Citation: 62 A. C. 869, 872.

The final contention of the defendant is that it was error for the prosecutor in his opening statement to say: "We will also show that because defendant was observed climbing over the fence and leaving his place of employment at the U. S. Gypsum Company on a number of occasions, he was fired from his employment." No objection was made to the statement.

It is, of course, obvious that the existence of such a reason for the termination of the defendant's employment was not relevant in the present case except inso far as it might bear on his ability to climb over the fence to obtain paper of the nature of that involved in this case. It is to be noted, however, that shortly before the statement was made the court admonished the jury that an opening statement was not evidence and was not to be considered by the jury as such. Moreover, there is nothing in the record to indicate that the prosecutor was not acting in good faith. Before the case was submitted to it, the jury was instructed that, except as to factual stipulations, any statement made by counsel in the jury's presence concerning the facts in the case must not be regarded as evidence.

As stated in *People v. Grandos,* 49 Cal. 2d 490, at page 495: "[O]pening statements are supposed to be an outline of what the People intended to prove, and failure to do so, whether on account of rules of evidence or otherwise, does not necessarily indicate prejudice." (See also *People v. Lucas,* 160 Cal. App. 2d 305, 308.) The lack of prejudice in the present case is evident upon a review of the entire record. We are not free to declare that there has been a miscarriage of justice because it is not reasonably probable that a result more favorable to the defendant would have been reached in the absence

of the challenged statement. (See *People v. Watson,* 46 Cal. 2d 818, 834-837.)

We have also considered the impact of the reasoning of *People v. Dorado,* 62 Cal. 2d ....,* upon certain testimony given by the witness Henry McKay. Part of his direct examination was as follows: "Q. Was the defendant present at any time when the officers were interrogating you with regard to this paper? A. Yes. Q. Where was he with relation to where you were? A. He was in custody at the Hall of Justice. Q. No, I mean were you in the same room together or were—A. Yes. Q. And were you standing up or sitting down or where? A. We were seated. Q. And where was the defendant seated with relation to where you were seated? A. Kind of catty-corner from across the table from him. Q. Was there anything separating you two? . . . The Witness: No. Miss Friedenberg [deputy district attorney]: Q. How long was the interrogation period? A. About 30 minutes I guess. Q. And during the interrogation did you make statements implicting the defendant? A. Yes. Q. And what did the defendant say or do, if anything, when you made these statements? A. Nothing. Q. Were you present at any time when he was interrogated? A. No. Q. Do you recall whether or not during your own interrogation the defendant was asked any questions? A. Yes. Q. Do you recall what he was asked, and the answer he gave? A. Not exactly."

On cross-examination the witness McKay testified in part as follows: "Q. This interrogation of you, Mr. McKay, was actually done by Sergeant Poggione and Sergeant Evans, who is sitting here at the counsel table, is that correct, sir? A. Yes. Q. And do you remember

*Advance Report Citation: 62 A. C. 350.

that when Mr. Wheaton was asked to comment on what you had said that Mr. Wheaton reminded the officers that he was told by Mr. Radzik, . . . he is an attorney, by Mr. Radzik, not to discuss the case without one of the attorneys being present? Miss Friedenberg: I object to the form of the question, I think it is ambiguous and compound and a portion of it contains a conclusionary statement of counsel. The Court: Reframe the question, Counsel. Mr. Weaver [defendant's attorney]: I'm sorry. Q. When Mr. Weaton was asked to comment on the questions presented to you and the answers that you had given, then Mr. Wheaton reminded the officers that he, Mr. Wheaton, was told not to discuss the case without his attorney being present? Miss Friedenberg: Well, I'd object as assuming a fact not in evidence. The Court: Overruled. The Witness: I don't remember anything like that."

The witness did not testify as to any specific statement made by him or by the defendant to the police officers. He said that he made "statements implicating the defendant" and that the defendant remained silent, but the content of his "implicating" statement was not disclosed. Obviously no confession by the defendant was involved. At most, only a very indefinite inference of an implied admission on the part of the defendant could reasonably be drawn from Henry McKay's testimony. It is not reasonably probable that there would have been a result more favorable to the defendant Wheaton if the quoted testimony of Henry McKay had been excluded. Consequently, there can be no valid claim of prejudice under the *Dorado* rule. (See *People v. Hillery*, 62 Cal. 2d , .*)

*Advance Report Citation: 62 A. C. 726, 746-747.

A consideration of the whole record leads to the conclusion that the defendant rceived a fair trial and that the verdicts of the jury were amply sustained by the evidence.

In a prior case (Superior Court No. 254047) the defendant was found guilty of the crime of violation of section 10851 of the Vehicle Code. The proceedings were suspended without imposition of sentence and he was placed on probation for a period of three years. Because of his conviction of the charges as to the money orders discussed hereinabove, probation was revoked and, at the time of imposition of sentence for the latter charges, he was sentenced to be punished by imprisonment in the state prison for the term prescribed by law for the offense of violation of section 10851 of the Vehicle Code, the sentences in the two cases to run concurrently. He has also appealed from that judgment but, in the absence of a basis for the reversal of the judgment in the later case relating to money orders, the judgment imposed upon the revocation of probation must stand.

The judgments in both cases (Superior Court No. 254047 and No. 277560) are affirmed.

Ford, *J.*

We concur:

Shinn, *P. J.*

McMurray, *J. pro tempore.***

**Assigned by Chairman of Judicial Council.

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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

KENNETH REYNOLDS WHEATON,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response to Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division Three.

Introduction.

Petitioner, Kenneth Reynolds Wheaton, having filed in this court a petition for writ of certiorari to the California District Court of Appeal in which he seeks reversal of a criminal conviction affirmed by that court, comes now respondent, the Attorney General of the State of California, and submits this response to said petition as requested by letter dated February 21, 1966, from the Clerk of this Honorable Court.

Statement of the Case.

After trial by jury in the Superior Court of Los Angeles County, petitioner was convicted of two counts of forging money orders, in violation of section 470 of the California Penal Code, and two counts of possessing blank money orders with intent to defraud, in vio-

lation of section 475 of the California Penal Code. He was duly sentenced to State Prison on the first two counts, and he appealed from the judgment. Division Three of the Second District Court of Appeal of the State of California affirmed petitioner's conviction in an unpublished[1] opinion filed July 30, 1965. A copy of that opinion is appended to petitioner's petition.

Petitioner's Contention.

Petitioner urges upon this court only one ground for the granting of a writ of certiorari. He maintains that the violation of a defendant's rights against self-incrimination enunciated in *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, should constitute reverisble error *per se,* and that where such a violation occurs no "harmless error" provision, such as Article VI, Section 4½ of the California Constitution, should be allowed to save the conviction from reversal. (Pet.[2] pp. 2-3.)

Reasons Why a Writ of Certiorari Should Not Be Granted.

The "Harmless Error" Provision of the California Constitution Does Not Conflict With the Federal Constitution and Is a Sound Provision of Law.

Petitioner's argument in this case strikes at the validity of Article VI, Section 4½ of the California Constitution. More familiarly known as the "harmless error rule" that section, enacted in 1911,[3] now provides:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirec-

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[1]Pursuant to Rule 976 of the California Rules of Court.

[2]Petitioner's Petition.

[3]And amended slightly in 1914.

> tion of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. [As amended November 3, 1914.]"

This case is not the only one in the current term of this court in which this provision of the California Constitution is under attack. Attention is also directed to *Daugherty v. California,* 743 Misc., and *Nelson v. California,* 595 Misc., other petitions for certiorari involving substantially the same question as presented here.

We think it axiomatic that "harmless error" provisions in the law of our different jurisdictions are beneficent provisions aimed at a worthy goal—the accomplishment of substantial justice. In *Smith v. United States,* 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041, this very court acknowledged that proposition. There it was said at 360 U.S. 9:

> ". . . Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. e.g., Hagner v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L.Ed. 774; United States v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L.Ed. 92. *This has been a salutary development in the criminal law.* . . ." (Emphasis added.)

See also:

> *Brown v. Allen,* 344 U.S. 443, 460, 73 S. Ct. 397, 408-409;

Russell v. United States, 369 U.S. 749, 763, 82 S. Ct. 1038, 1046;

Bihn v. United States, 328 U.S. 633, 638, 66 S. Ct. 1174-1175;

Corpus Juris Secundum, Criminal Law, Section 1887, Volume 24A, pages 872-876.

Thus we think there can be no serious quarrel with the general intent of Article VI, Section 4½ of the California Constitution. We believe the only question here is whether that Section can or should be applied to a case wherein the prosecution has commented upon a defendant's failure to testify, or whether that act by the prosecution is so flagrant a denial of due process to the accused that it must be held reversible error *per se.*

The California Supreme Court has, within little more than the last year, had occasion to review completely the law relating to comment upon an accused's failure to testify. In February, 1965, that court decided *People v. Modesto,* 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P. 2d 753. In that case in a lengthy opinion written by Chief Justice Traynor, a majority of the California Court held that comment upon an accused's failure to testify did not violate his rights against self-incrimination under the Federal Constitution. Within three months thereafter this court decided *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, and overturned the California Court by holding that comment upon an accused's failure to testify does violate his rights under the Fifth Amendment to the U. S. Constitution, made applicable to the States by the 14th Amendment to the U. S. Constitution.

But in *Modesto,* Justice Peters of the California Supreme Court, presaging the decision of this court in *Griffin,* dissented. He expressed the view that the California comment rule did violate an accused's constitutional rights. However he went on to say that in his opinion the error in commenting upon an accused's failure to testify would be subject to California's "harmless error" provision, *i.e.,* an appellate court would have to consider the entire circumstances to determine whether in a given case the unconstitutional comment amounted to reversible error. *People v. Modesto, supra,* at 62 Cal. 2d 454-464.

After this court's decision in *Griffin,* and under the impulse of that decision, the California Supreme Court, in *People v. Bostick,* 62 Cal. 2d 820, adopted what had been the dissent of Justice Peters only four months earlier, and held that the error in commenting upon a defendant's silence was, indeed, subject to Article ~~VI,~~ Section 4½ of the California Constitution.

We believe that this recent dialogue within the California Supreme Court offers abundant reason and authority in support of our position that comment upon an accused's failure to testify is not necessarily reversible error.

Wigmore apparently agrees with the conclusion of the California Supreme Court:

> "But there is no call for the stringent rule that a *new trial* shall be granted ipso facto where comment has been improperly made."
>
> 8 Wigmore on Evidence, Section 2272, page 436 (McNaughton rev. 1961).

While we must concede, in the light of the aforementioned cases, that error, in the form of comment upon petitioner's failure to testify, did occur in the instant case, we see nothing in the nature of that error which should compel the adoption of a formalistic rule that such error necessarily requires reversal. As pointed out by the California Supreme Court in *People v. Bostick, supra,* and by Justice Peters of that court, dissenting in *People v. Modesto, supra,* even this Honorable Court has recognized that not every violation of a constitutional right amounts to reversible error *per se.* We submit that not only is this approach to the problem of error sound, but furthermore it is the only truly reasonable and fair approach to the problem capable of giving to each side in a criminal lawsuit the fair trial to which it is entitled. If it can safely be said by a panel of experienced judges who have reviewed the entire record of a trial that a result more favorable to the accused would not have been likely in the absence of a given error, what useful objective is served by requiring a new trial? Indeed, is it not possible that the entire judicial process, and the public respect upon which it rests, is undermined by such a formalistic approach?

See:

Holtzoff, Shortcomings in the Administration of Criminal Law, 17 Hast. L. J. 17 at pp. 26-33.

We concede that where a coerced confession is introduced at trial, the error in admitting such a confession is reversible *per se.* The impact of a confession, a defendant's own incriminating words, is undeniably powerful. But the impact of merely pointing out to a jury something already obvious to them *i.e.,* the defendant's failure to testify, has no such devastating im-

pact. Respondent respectfully urges that psychological common sense dictates that where a criminal accused chooses to remain silent in the face of serious criminal charges his own self-imposed silence thunders more loudly in a jury's ears than anything that a prosecutor might be able to say with respect to that silence. Indeed, as this court said in *Griffin,* a prosecutor's comment upon an accused's silence may have some aggravating value in the weight of the case against the accused. But we submit that that quantum of aggravation is not so great that in the normal course of events it denies the accused due process to the extent that it should result in a new trial *per se.*

In another context the California Supreme Court has applied, we think correctly, the same principle we seek here.

In *People v. Parham,* 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P. 2d 1001, that court held that the admission into evidence of items seized from a defendant in violation of his rights under *Rochin v. California,* 342 U.S. 165 [72 S. Ct. 205, 96 L. Ed. 183] was not reversible error where there was other compelling evidence of the defendant's guilt. As we read *Parham* that case stands for the sound proposition that the violation of a defendant's rights should not deprive society of the fair trial to which it, as well as the defendant, is entitled, unless the violation was a significant contributory factor in the accused's conviction.

Along those same lines, Justice Tobriner used the following language in *In re Lopez,* 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P. 2d 380, which we consider to be highly relevant and significant at a point in our history when the competing considerations of the public's

right to protection from crime and the criminal's right to be fairly convicted are so noticeably in the public eye:

> ". . . We know now that we must choose here between competing values; we must seek to preserve a dynamic concept of constitutional right rather than sacrifice it upon an unrealistic and destructive altar of absolutism. . . ."
>
> *In re Lopez, supra,* at p. 379.

And continuing, Justice Tobriner said at pages 380-382:

> "Petitioner argues that because we deal with a constitutional protection we must apply it retroactively on collateral attack. In refusing to apply Mapp retroactively, the Court of Appeals for the Second Circuit met that argument as follows: 'It is pointed out that where constitutional rights are violated prejudice is presumed. It is our view, however, that the development of constitutional law calls into play precisely the same operations of the judicial process as does the development of a body of decisional law in any other field. The extent to which the new doctrine is to be applied should depend, in the language of Mr. Justice Cardozo, upon "considerations of convenience, of utility, and of the deepest sentiments of justice." ' (United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 16.)
>
> "Nor can we overlook the further consideration that retroactivity would impose impossible burdens upon the administration of criminal justice. Unlimited retroactive application of Escobedo would result in the reconsideration of countless cases that were correctly decided under the law in force at the time of trial; in many such cases witnesses

and evidence would no longer be available. Many hardened and dangerous criminals would glean the greatest profit from unlimited retroactivity; they serve lengthy sentences imposed long ago; their cases thus offer the least likelihood of successful retrial. To require a general release of prisoners of undoubted guilt would be to cripple the orderly administration of the criminal laws. (See United States v. Sobell (1963) 314 F.2d 314, 323, fn. 6, 324 (Friendly, J.); United States ex rel. Durocher v. LaValle (1964) 330 F.2d 303, 314, 315 (concurring and dissenting opinions); United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 20-21.)

"A ruling that Escobedo compelled retroactive collateral attack could well impede further developments in constitutional law. The absolute application of new interpretations, which on the surface appears as an instrument of fair play, in reality may stand as a formidable barrier to a dynamic application of constitutional standards. If every change must ipso facto be applied to all prior proceedings, no matter how ancient, future change may be put in jeopardy. (See United States ex rel. Angelet v. Fay (1964) 333 F.2d 12, 20-21; Freund, New Vistas in Constitutional Law (1964) 112 U.Pa. L.Rev. 631, 637-638.)

"We therefore conclude that because the justification of the requirement of the right to counsel at the accusatory stage lies in the prospective purpose of benefiting the overall system of criminal administration by drying up the sources of coercion, no purpose would be served by applying Escobedo retroactively." (Footnote omitted.)

We submit that this language, used in the context of deciding whether a constitutional right should be applied retroactively, applies equally to the consideration of whether a conceded error, but a slight and insignificant one, should formalistically result in reversal of convictions fairly gained under the law in existence at the time of trial, and where the newly discovered "error" played but a minor rule in securing of the conviction.

Conclusion.

For these reasons we respectfully request that petitioner's petition for certiorari be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WHEATON *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 46. Decided March 13, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case remanded for further consideration in the light of *Chapman* v. *California*, 386 U. S. —.

MR. JUSTICE STEWART would grant certiorari and reverse the judgment for the reasons stated in his concurring opinion in *Chapman* v. *California*, 386 U. S. —.